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SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 270

THE HENRIETTA MILLS,

Petitioner,

v.

RUTHERFORD COUNTY, IN THE STATE OF NORTH CAROLINA AND W. C. HARDIN, SHERIFF.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

MURRAY ALLEN,
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WILLIS SMITH,
W. T. JOYNER,
Of Counsel.

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RUTHERFORD COUNTY, IN THE STATE OF NORTH CAROLINA AND W. C. HARDIN, SHERIFF.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of The Henrietta Mills respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The Henrietta Mills is a North Carolina corporation owning property in Rutherford County in said State. As complainant it filed a bill of complaint in the District Court of the United States for the Western District of North Carolina seeking to restrain and enjoin Rutherford County and its sheriff from levying upon its property and selling same in an effort to collect taxes for the year 1927 based on an alleged unlawful assessment of its property by the tax officials of that county, as finally partially reduced and approved by the State Tax Commission of North Carolina. It bases its claim for Federal jurisdiction on the contention that unless injunctive relief is afforded as prayed, the corporation will be deprived of its property without due process of law,

and be denied the equal protection of the laws by the State of North Carolina and the officials of Rutherford County in contravention of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Circuit Court of Appeals holds that the bill of complaint does make out a case within the jurisdiction of the Federal Court, stating a substantial controversy under the Fourteenth Amendment to the Constitution of the United States. It holds that if the allegations are true, the complainant has been denied the equal protection of the law by the tax officials of Rutherford County, whose action in this respect must be considered to be the action of the State.

Under the Constitution of North Carolina, Article V, Section 3, it is provided that:

> "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money; . . ."

The Constitution further provides by Article VII, Section 9, that:

> "All taxes levied by any county, city, town, or township, shall be uniform and ad valorem upon all property in the same, except property exempted by this Constitution."

Section 7971 (46) of the Consolidated Statutes of North Carolina contains a provision that it is the purpose of the tax laws of the State to assess all property at its true and actual value in money—that is, what the property would bring at cash sale when sold in the usual manner.

The complainant contends that the actual value of its property in Rutherford County, North Carolina, on May 1st, 1927, the tax listing date, did not exceed $1,887,352.00; but the property was actually assessed by officials of the county in 1927 at $2,637,819.00, in violation of the rights of the complainant both under the Constitution of the United States

and of North Carolina and under the Statutes of the State. The complainant filed a complaint with the County Board of Equalization and Review under the provisions of the law, Section 7971 (89), in which it objected to the over-valuation of its property. The Board thereupon declined and refused to hear complainant or to pass upon the question presented by its complaint of over-valuation. Thereafter, in accordance with the statutory provision the Henrietta Mills appealed to the State Board of Assessment under Section 7971 (90) of the Consolidated Statutes, which, after a hearing contended by the complainant to have been superficial, reduced the assessment by $275,000.00 and fixed the value of the complainant's property at $2,362,819.00.

The complainant charged in its complaint that the tax officials of the county and of the State had intentionally, systematically and arbitrarily fixed the value of complainant's property greatly in excess of its true value while at the same time allowing or fixing the value of practically all other property liable for taxes in Rutherford County at only 60% of its true value. Complainant contended that its assessment should be reduced to sixty per cent of its true value, or to the sum of $1,132,411.20; and that any assessment for the year 1927, in excess of said sum is an arbitrary, intentional, and systematic taking of complainant's property in violation of the constitutional rights under both Federal and State Constitutions.

The complainant paid to Rutherford County through the sheriff the sum of $26,894.77 which is equal to the tax fixed by the officials of the county upon the valuation of $1,132,411.20, said payment being made without prejudice to the rights of either the complainant or the defendants.

The defendants deny that there has been an arbitrary and intentional over-valuation of complainant's property or any discrimination in the assessment of the property as compared with other property in the County and State. The defendants then contend that if the complainant was aggrieved by the decision of the tax officials, it had an adequate remedy at law

under Section 7979 of the Consolidated Statutes of North Carolina, which provides for payment of tax under protest and suit to recover, and that, therefore, the United States District Court did not have jurisdiction of the equitable action.

Numerous affidavits, many of them by other taxpayers of Rutherford County, were offered in support of the contentions of the complaint, and the complainant insisted that the evidence as appears in the record was overwhelming in support of its contention both as to over-valuation and as to discrimination with other property. However, the District Court found that the complainant had an adequate remedy at law, and dismissed both the petition for an Interlocutory Injunction and the Bill. Whereupon, the complainant appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the holding of the District Court on the theory that complainant had an adequate remedy at law, and that Sec. 267 of the Judicial Code forbade equity jurisdiction.

Section 7979 providing for the payment of tax under protest and suit to recover is somewhat lengthy and is found on page 17 as "Appendix A."

B.

Reasons Relied on for the Allowance of the Writ.

1. The holding of the Circuit Court of Appeals of the Fourth Circuit in this case is in conflict with the holding of the Circuit Court of Appeals of the Sixth Circuit, the Eighth Circuit and of various other Federal Courts as set forth in the brief in support of this petition.

2. The Circuit Court of Appeals misinterpreted the decisions of the North Carolina Supreme Court as they affected the case at bar, such decisions being cited and referred to in the brief in support of this petition.

3. The construction placed on Section 267 of the Judicial Code, USCA Title 28, Section 384, stating that:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law,"

is in conflict with the holding of other Federal Courts as to the proper construction of that section of the Judicial Code.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day set to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2803, The Henrietta Mills, Appellant, v. Rutherford County, in the State of North Carolina, and W. C. Hardin, Sheriff, Appellees, and that the said judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE HENRIETTA MILLS,

By MURRAY ALLEN,
Counsel for Petitioner.

WILLIS SMITH,
W. T. JOYNER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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No.------

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v.

RUTHERFORD COUNTY, IN THE STATE OF NORTH CAROLINA AND W. C. HARDIN, SHERIFF.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals is reported in the Federal Reporter Advanced Sheets for June 27th, 1929, Volume 32, (2d) Page 570. The opinion was handed down on May 2nd, 1929, and appears in the Record, p. 174. The opinion of the District Court appears in the Record, p. 160.

II.

Jurisdiction.

1. Petition for writ of certiorari in this case is based on Judicial Code, Section 240, as amended by the Act of February 13th, 1925, 43 Stats. 938; USCA Title 28, Section 347.

2. The date of the judgment to be reviewed is May 2nd, 1929 (R., 184).

3. The bill of complaint sets forth that this is a case arising under the Constitution of the United States and the Fourteenth Amendment thereof (R., p. 4), and the opinion of the Circuit Court of Appeals (R., p. 177), recites that the bill of

complaint does state a cause of action under the Constitution of the United States. The ruling of the court below, however, was in conflict with the ruling of the Circuit Court of Appeals of the Sixth Circuit in the case of *Grether v. Wright*, 75 Federal Reporter, 742; and of the Eighth Circuit in the case of *North Side Canal Co. v. State Board*, 17 Federal Reporter (2d) 55, and other Federal Courts, and the said ruling was also contrary to the holding of the Supreme Court of North Carolina on the question of when equitable remedy is available.

4. The cases believed by complainant to sustain the jurisdiction are cited herein in connection with the argument.

III.

Statement of the Case.

A statement of the case is set forth under the heading "A" in the Petition for the Writ of Certiorari stating concisely and yet in sufficient detail the facts in the case. For the sake of brevity this statement will not be repeated here.

The Court held that there was no merit to the complainant's contention that without the intervention of a court of equity a multiplicity of suits might develop by reason of the fact that the assessment was a quadrennial one and that taxes for four years would be computed on the basis of the quadrennial assessment.

The complainant contends that its property is grossly overassessed and at a valuation far in excess of its true value, while the property of other taxpayers generally in Rutherford County is assessed at 60% of its true value. This contention was supported by an overwhelming amount of evidence, as appears in the record, an examination of which, p. 72, *et seq.*, gives a slight indication of the basis of assessment generally for property in Rutherford County. The financial statements of the county as set forth in the record, pages 98 and 102, indicate the basis of assessments on property as a whole in the county and the affidavits of numerous citizens, record pages

95-110, bear out the contention of the complainant that property generally is assessed on a basis of 60% of its value, while the property of complainant is assessed at more than 100% of its value, as shown by the testimony of Prof. Nelson, Record, p. 52, and other witnesses. The complaint appears in the Record, pages 5-19, and the answer in the Record, pages 19-38.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that complainant had an adequate remedy at law and was, therefore, not entitled to equitable relief in the Federal Court.

2. The Circuit Court of Appeals erred in finding and holding that complainant was not entitled to equitable relief on account of Section 267 of the Judicial Code, USCA Title 28, Sec. 384.

3. The Circuit Court of Appeals erred in finding and holding that under the decisions of the Supreme Court of North Carolina complainant would not be entitled to equitable relief, the Circuit Court of Appeals having confused the rights and remedies of an ad valorem taxpayer, such as complainant, with those of a license taxpayer under the North Carolina law.

4. The Circuit Court of Appeals erred in finding and holding that the remedy by an action at law provided for by Sec. 7979 of the Consolidated Statutes was such as to forbid access to a Federal Court of equity.

5. The Circuit Court of Appeals erred in affirming the decision of the District Court, and dismissing the bill.

V.

Argument

In order to set out clearly the points involved and the reasons and authorities cited thereunder the argument is summarized as follows:

Summary of the Argument

A. The decision of the Circuit Court of Appeals for the Fourth Circuit is contrary to and in conflict with the holding of other Federal Courts.

B. The law of North Carolina recognizes injunctive relief, and the ruling of the Supreme Court of North Carolina under similar state of facts is not as construed in the decision of the Circuit Court of Appeals.

A.

CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS

The Court below held that complainant was not entitled to equitable relief because it had an adequate remedy at law. It found that this adequate remedy at law was available under Section 7979 of the Consolidated Statutes of North Carolina; which statute is set forth in Appendix A, and the most pertinent part of which provides:

> "Unless a tax or assessment, or some part thereof, be illegal or invalid or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part nor to restrain the sale of any property for the non-payment thereof."

It will be noted that the North Carolina statute providing for payment of taxes under protest, C. S., Sec. 7979, does not hold that no injunction shall lie, but recognizes injunctive relief where the assessment or some part thereof is illegal or invalid. The Court's attention is directed to the opinion of *Mr. Chief Justice Taft*, while he was Circuit Judge, in the case of *Grether, et al. v. Wright, et al.*, 75 F., 742. That was a case somewhat similar to the case at bar, and the Ohio statute recognized injunctive relief, as does the North Carolina statute, although in different language. In this opinion *Mr. Justice Taft* discussed the case of *Cummings v. Bank*, 101 U. S., 153; *Shelton v. Platt*, 139 U. S., 591; *Whitehead*

v. Shattuck, 138 U. S., 146, and other cases, drawing clear distinctions between the holdings of the Court in those cases, and reached the conclusion that the complainant was entitled to equitable relief. He stated clearly the reason for and the proper construction to be given to Section 267 of the Judicial Code, providing that:

> "Suits in equity shall not be sustained in any Court in the United States in any case where a plain, adequate, and complete remedy may be had at law."

He showed that the object and reason of that statute was to protect a party in his right to a trial by jury and that the statute did not apply where the laws of the State recognized injunctive relief, and where right to trial by jury would not be affected.

In the case of *North Side Canal Company v. State Board of Equalization,* a case from the Circuit Court of Appeals for the 8th Circuit, reported in 17 F. (2d) 55, equitable relief under very similar circumstances was allowed, and a petition to this Court for writ of certiorari was denied April 25, 1927, 274 U. S., ____, 71 L. Ed. 1320. The statute of Wyoming was cited, as was also the case of *Cummings v. Bank, supra,* and *Grether v. Wright, supra,* and other cases holding to like effect. The oft repeated expression from *Davis v. Gray,* 16 Wall., 203, 21 L. Ed., 447.

> "A party by going into a national Court does not lose any right or property of which he might have availed himself in the State Courts in the same locality,"

is cited, as is also the expression in *Dawson v. Kentucky Distilleries,* 255 U. S., 288,

> *"And if the equitable remedy was available in the State Courts, it was not lost by suing in the Federal Court."*

The opinion of the court below seemed to have been based upon Section 267 of the Judicial Code, *supra,* and the decision in *Pusey & Jones v. Hanssen,* 261 U. S., 491. Complainant,

however, contends that the *Pusey & Jones case* is not an authority on the case at bar, for the reason that that was a case where a simple contract creditor was endeavoring to have a Receiver appointed on a simple unsecured debt, which remedial practice was not recognized under the Federal law, but which remedy was given by a recent statute of Delaware, authorizing the Chancellor of its Court of Equity to appoint a Receiver under such circumstances. The Court properly held that that was not a case for equitable relief in the Federal Court. In that case Pusey & Jones were entitled to a trial by jury first to determine whether or not the claim of Hanssen was valid. It was for that reason and in that view of the case that the Supreme Court refused to allow equitable relief.

On the other hand, the cases of *Grether v. Wright* and *North Side Canal Company v. State Board, supra,* held that equitable relief was proper, and the holdings in those two circuits are in direct conflict with the holding in the case at bar.

Furthermore, it must be borne in mind that this complainant is not asking the Federal Court to exercise its jurisdiction on account of any new remedy such as was the case in the *Pusey & Jones v. Hanssen case.* Rather, it is asking the Court to afford it equitable relief in a case where its rights under the Constitution of the United States are about to be invaded, the Circuit Court of Appeals having found that the bill of complaint does state a cause of action arising under the Constitution. We think that the Court was in error in deciding this case on the basis of the decision in the *Pusey & Jones case.*

Injunctive relief has been recognized as proper in the Federal Court in somewhat similar cases in many jurisdictions, and it has been held, that, except where right to trial by jury would be affected, that the Federal Courts would grant equitable relief, if such relief was recognized in the State Courts and by State law:

Grover v. Merritt Development Co., (Minn.), 7 Fed. (2d), 917.

West. Union Telegraph Co. v. Tax Commission, (Ohio), 21 Fed. (2d), 355.

Connecting Gas Co. v. Imes (Ohio), 11 Fed. (2d), 191.

The Court in *Meyers v. Shields,* (Ohio), 61 Fed., 713 discusses *Shelton v. Platt, supra,* and distinguishes by showing that in Tennessee there was an act prohibiting any remedy except at law as provided for. *City Railway Co. v. Beard* (Ohio), 293 Fed., 488, held that equitable relief was to be granted if the remedy at law was doubtful and defined "adequate."

B.

THE CIRCUIT COURT OF APPEALS MISINTERPRETED THE RULING OF THE NORTH CAROLINA SUPREME COURT ON THE QUESTION OF INJUNCTIVE RELIEF

In the opinion of the Court below the case of *Ragan v. Doughton,* 192 N. C., 501, was cited as holding against the contention of the complainant that injunctive relief was recognized by the North Carolina Court. It is respectfully suggested that the Court below misunderstood the ruling in *Ragan v. Doughton* because that opinion dealt with a case arising under Section 30, Chapter 101, of the Public Laws of 1925, being the biennial revenue act of North Carolina, and the question was whether or not the plaintiff in that case came within the designation of the taxing act as had been ruled by the Revenue Department. Chief Justice Stacy said in part:

> "We think a fair interpretation of the pertinent decisions, construing the statutes applicable, would be to say that where the legality of the tax, or the legality of the assessment, or the purpose for which the tax is assessed or authorized, is not assailed, but the taxpayer merely contends, contrary to the ruling of the Revenue Department, that he does not come within the class taxed,

> in the absence of circumstances sufficient to invoke the aid of a court of equity, his remedy for determining this controverted question of fact, which challenges only the administration of the law, is not by seeking to enjoin the collection of the tax, but by paying it under protest and then suing to recover it back,"

citing *Sherrod v. Dawson,* 154 N. C., 528.

In the more recent case of *Hunt v. Cooper,* 194 N. C., 265, it is said:

> "It is provided by statute that unless a tax or asessment, or some part thereof, be illegal or invalid or levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or part, and that if any person shall have a valid defense to the enforcement of a tax or assessment which is not illegal or unauthorized, he shall pay . . . such tax or assessment to the sheriff, and afterwards seek to recover it in accordance with the statutory method."

In the case of *Atlantic Coast Line v. Doughton,* 262 U. S., 413, a North Carolina case, the Supreme Court of the United States held, that in the absence of a decision by the State Court to that effect, that it could not say that the remedy of payment under protest is plain and adequate. Since the decision in that case there have been the following decisions by the Supreme Court of North Carolina recognizing injunctive relief:

> Railroad Co. v. Commissioners, 188 N. C., 265.
> Bond v. Tarboro, 193 N. C., 249.
> Hunt v. Cooper, 194 N. C., 265.
> Southern Railroad Co. v. Cherokee County, 195 N. C., 756.

The case of *Marion v. Pilot Mountain,* 170 N. C., 118, cited in the opinion in the Circuit Court of Appeals is, we respectfully submit, not in point because an examination of that

opinion discloses that the plaintiff failed to take any of the administrative steps to protect his rights and, in fact, acquiesced in what was done up to the point of payment of the amount assessed against his property.

It is, therefore, respectfully submitted that in a case such as the case at bar where an assessment for ad valorem taxation purposes is alleged to be unlawful and invalid, and the taxpayer has a cause of action arising under the Constitution of the United States, he is entitled to seek injunctive relief in a Federal Court of Equity.

The right to equitable relief has been recognized in North Carolina both before and since the enactment of Section 7979 of the Consolidated Statutes referred to in the opinion of the Court below and set forth elsewhere in this brief; the case of *Range Co. v. Carver,* 118 N. C., 328, being before the enactment of that statute and the case of *Purnell v. Page, supra,* and other cases cited, since the enactment. Furthermore, injunctive relief has been recognized in North Carolina by another statute where the tax assessment is illegal or invalid, C. S. 858, Appendix B.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decisions of the lower Federal Courts may be reconciled, or the correct rule laid down by this Court, and proper construction placed upon Sec. 267 of the Judicial Code as it affects cases similar to the case at bar, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals in the Fourth Circuit and finally reverse it.

Respectfully submitted,

MURRAY ALLEN,
Counsel for Petitioner.

WILLIS SMITH,
W. T. JOYNER,
Of Counsel.

Appendix "A"

Section 7979 C. S.

"Unless a tax or assessment, or some part thereof, be illegal or invalid or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part nor to restrain the sale of any property for the non-payment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer. (Rev., s. 2855; 1901, c. 558, s. 30.)"

Appendix "B"

Section 858 C. S.

"No injunction may be granted by any court or judge to restrain the collection of any tax or any part thereof, or to restrain the sale of any property for the non-payment of any tax, unless such tax or the part thereof enjoined is levied or assessed for an illegal or unauthorized purpose, or the tax assessment is illegal or invalid."